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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

VELMA A. REID,

Civil No. 07-6160-AA
OPINION AND ORDER

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

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AIKEN, Judge:

Claimant, Velma Reid, brings this action pursuant to the

1 Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
2 1383(c)(3), to obtain judicial review of a final decision of the
3 Commissioner denying her application for Supplemental Security
4 Income (SSI) disability benefits under Title XVI of the Act. For
5 the reasons set forth below, the Commissioner's decision is
6 reversed and remanded for payment of benefits.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff protectively filed her application for disability
9 insurance benefits on August 13, 2003. Tr. 70-72. Plaintiff's
10 application was denied initially and on reconsideration. Tr. 23-
11 36. After hearings held on August 7, 2006, and January 22, 2007,
12 the Administrative Law Judge (ALJ) issued a decision on March 21,
13 2007, finding plaintiff not disabled. Tr. 10-20. On May 15,
14 2007, the Appeals Council denied plaintiff's request for review,
15 tr. 5-9, making the ALJ's decision the final agency decision.
16 See 20 C.F.R. §§ 404.981, 422.210.

17 **STATEMENT OF THE FACTS**

18 Plaintiff was 44 years old at the time of her disability
19 application, and 47 years old at the time of the ALJ hearing.
20 Tr. 70. Plaintiff alleged disability since March 1, 2003, based
21 on pain in her legs, hips, and back, and memory problems. Tr.
22 70, 87. Plaintiff obtained a high school education and had past
23 relevant work experience as a telemarketer. Tr. 93, 242, 290.
24 Plaintiff last worked in November 2001, prior to her alleged
25 onset date, when she was laid off from her job. Tr. 87, 243,
26 246-47.

27 **STANDARD OF REVIEW**

28 This court must affirm the Secretary's decision if it is

1 based on proper legal standards and the findings are supported by
2 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
3 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
4 mere scintilla. It means such relevant evidence as a reasonable
5 mind might accept as adequate to support a conclusion."
6 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
7 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
8 The court must weigh "both the evidence that supports and
9 detracts from the Secretary's conclusions." Martinez v. Heckler,
10 807 F.2d 771, 772 (9th Cir. 1986).

11 The initial burden of proof rests upon the claimant to
12 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
13 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
14 an "inability to engage in any substantial gainful activity by
15 reason of any medically determinable physical or mental
16 impairment which can be expected . . . to last for a continuous
17 period of not less than 12 months. . . ." 42 U.S.C.
18 § 423(d)(1)(A).

19 The Secretary has established a five-step sequential
20 process for determining whether a person is disabled. Bowen v.
21 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
22 416.920. First the Secretary determines whether a claimant is
23 engaged in "substantial gainful activity." If so, the claimant
24 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
25 §§ 404.1520(b), 416.920(b).

26 In step two the Secretary determines whether the claimant
27 has a "medically severe impairment or combination of
28 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.

1 §§ 404.1520(c), 416.920(c). If not, the claimant is not
2 disabled.

3 In step three the Secretary determines whether the
4 impairment meets or equals "one of a number of listed impairments
5 that the Secretary acknowledges are so severe as to preclude
6 substantial gainful activity." Id.; see 20 C.F.R.

7 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
8 presumed disabled; if not, the Secretary proceeds to step four.
9 Yuckert, 482 U.S. at 141.

10 In step four the Secretary determines whether the claimant
11 can still perform "past relevant work." 20 C.F.R.

12 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
13 disabled. If she cannot perform past relevant work, the burden
14 shifts to the Secretary. In step five, the Secretary must
15 establish that the claimant can perform other work. Yuckert, 482
16 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
17 (f). If the Secretary meets this burden and proves that the
18 claimant is able to perform other work which exists in the
19 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
20 416.966.

21 DISCUSSION

22 At step one of the five step sequential evaluation process
23 outlined above, the ALJ found that plaintiff had not engaged in
24 substantial gainful activity after her alleged onset date of
25 March 1, 2003. Tr. 15, Finding 1. This finding is not in
26 dispute. At step two, the ALJ found that plaintiff had the
27 following severe impairments: lumbar degenerative disease, morbid
28 obesity, affective disorder, and personality disorder. Tr. 15,

1 18, Finding 2. This finding is not in dispute. At step three,
2 the ALJ found that plaintiff's impairments did not meet or equal
3 the requirements of a listed impairment. Tr. 15, Finding 3.
4 This finding is not in dispute.

5 The ALJ determined that plaintiff had the residual
6 functional capacity (RFC) to perform a reduced range of sedentary
7 work. Tr. 16, Finding 4.

8 At step four, the ALJ found that plaintiff was unable to
9 perform her past relevant work. Tr. 19, Finding 5. Finally, at
10 step five, applying the framework of the Medical-Vocational
11 Guidelines, and relying on the testimony of a vocational expert
12 (VE), the ALJ found that plaintiff could perform other work
13 existing in significant numbers in the national economy. Tr. 19-
14 20, Findings 6-9. This finding is conceded by the Commissioner
15 as error. Def's Memo in Support of Remand, p. 4.

16 The defendant filed a motion to remand this case to the ALJ
17 conceding that the ALJ's decision contains legal errors and
18 arguing that those errors must be addressed before the court can
19 determine whether plaintiff is disabled. Plaintiff opposes the
20 motion to remand arguing that the court should reverse and remand
21 for a finding of disability stating that all improperly evaluated
22 evidence should be credited as true. Pl's Brief, p. 14.

23 The defendant concedes that the ALJ erred in failing to
24 adopt the complete opinion of Dr. French regarding plaintiff's
25 residual functional capacity, in evaluating the statement of lay
26 witness, Ms. Hunter, and in identifying jobs at step five that
27 plaintiff could perform. Specifically, defendant concedes that
28 plaintiff could not perform the jobs identified by the vocational

1 expert at step five if Dr. French's reaching restriction was
2 incorporated into plaintiff's residual functional capacity.
3 Nevertheless, the defendant argues that the ALJ's "not entirely
4 credible" finding regarding plaintiff's testimony of disability
5 was proper.

6 1. Dr. French's Opinion

7 On September 19, 2006, plaintiff was examined by Dr. John
8 French on behalf of the agency. Tr. 228. Dr. French diagnosed
9 plaintiff with chronic diffuse pain, noting radiographic evidence
10 of degenerative changes in the knee. Tr. 230. He noted that
11 plaintiff's examination was "certainly" consistent with the x-
12 rays. Id. He advised that she should limit kneeling, squatting,
13 crawling and heavier lifting. Id. Dr. French recommended weight
14 loss. Id. He limited her to light work due to degenerative
15 disease in her back which limits her from performing repetitive
16 flexion. Id. Dr. French found that plaintiff had adequate fine
17 motor coordination of both of her extremities. Id. He
18 recommended an ergonomic chair at the work site and occasional
19 changes of position. Id. He wrote that she should not be
20 walking or weight bearing for prolonged periods of time given the
21 degenerative changes in her knees. Id. Dr. French wrote that
22 plaintiff "certainly may have some degenerative disease" in her
23 wrist, aggravated by weight bearing in the upper extremities.
24 Id. He noted that plaintiff appeared to have significant
25 depression, and mental health issues, and may be more disabled on
26 that basis than on the basis of her musculoskeletal limitations.
27 Id. Dr. French concluded that plaintiff should sit less than six
28 hours in an eight-hour work day. Tr. 233. He found she was

1 limited to lifting 10 pounds in the upper extremities and limited
2 in reaching in all directions, including overhead, although she
3 could "occasionally" reach. Tr. 234.

4 The defendant concedes that the ALJ failed to incorporate
5 both Dr. French's reaching limitation and his finding that
6 plaintiff should have an ergonomic chair on the job site into his
7 residual functional capacity assessment. The ALJ must provide
8 clear and convincing reasons supported by substantial evidence to
9 reject uncontradicted opinions from treating or examining
10 doctors. Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir.
11 2006). When, as here, the Commissioner fails to provide adequate
12 reasons for ignoring the opinion of a treating or examining
13 physician, that opinion is generally credited as true as a matter
14 of law. Id. at 1069. When Dr. French is credited on this issue,
15 plaintiff must be found disabled, as the reaching limitation and
16 need for a special chair preclude the jobs identified by the VE.

17 Further, the Commissioner did not meet her burden of
18 proving that plaintiff retains the ability to perform "other
19 work" in the national economy. The ALJ found that plaintiff was
20 not able to perform her past relevant work. Tr. 19. Therefore,
21 the burden shifts to the Commissioner to prove that plaintiff is
22 capable of working an eight-hour day at some alternate job within
23 her residual functional capacity. Tackett v. Apfel, 180 F.3d
24 1094, 1100 (9th Cir. 1999). To meet that burden, the Commissioner
25 may rely on the testimony of a VE, however, the hypothetical
26 posed to the VE must accurately contain all of plaintiff's
27 limitations that are supported by substantial evidence on the
28 record. Robbins v. Social Security Administration, 466 F.3d 880,

1 886 (9th Cir. 2006).

2 As noted above, Dr. French clearly found that plaintiff
3 could only "occasionally" reach and that "reaching in all
4 directions (including overhead)" was "limited." Tr. 234.
5 According to the Dictionary of Occupational Titles (D.O.T.), the
6 jobs identified by the VE for plaintiff as "other work in the
7 national economy" included a hand packager, who must "constantly
8 reach throughout the workday;" and sorting, small products
9 assembly, and cashiering all require "frequent" reaching. See
10 D.O.T. 920.587-018, 361.687-014, 706.684-022, 211.462-010.
11 Therefore, when crediting Dr. French's uncontradicted opinion,
12 plaintiff must be found disabled. Further, Dr. French found that
13 plaintiff should be provided with an ergonomic chair on the job
14 site. Tr. 230. The ALJ also failed to incorporate this
15 restriction into plaintiff's residual functional capacity. The
16 VE testified that employers would not always provide an ergonomic
17 chair, and he was unable to estimate the number of jobs in which
18 such a chair would be provided. Tr. 293-94. Defendant provided
19 no evidence that plaintiff has the capacity to perform "other
20 work" in the national economy. Therefore, a finding of
21 disability is appropriate and supported by substantial evidence.

22 2. Plaintiff's Credibility

23 Plaintiff testified at the hearing that she weighed 273
24 pounds. Tr. 240. She said that she did not feel she could
25 perform her past job because she had problems concentrating. Tr.
26 248. She thought this was because she hurt all the time. Id.
27 Plaintiff testified that she hurt everywhere in her body but
28 particularly had bad headaches and pain in her knees, ankle, the

1 back of her neck and back part of her eyes. Id. She had vision
2 trouble but had not been able to afford glasses. Tr. 249. She
3 also had not been able to afford physical therapy because it was
4 not covered by insurance. Tr. 251. Plaintiff testified that she
5 used a cane all the time, even at home, because of her back,
6 knees and ankle. Tr. 252. She testified she is in pain,
7 particularly in her low back, despite taking pain medication.
8 Tr. 253. She takes anti-depressant medication, but continues to
9 experience depression every day. Tr. 253-54. She testified that
10 she "hurt all the time," "cried a lot," and "sleeps so she does
11 not have to feel bad." Tr. 254-56. Plaintiff testified that she
12 sleep about six hours during the day, in addition to sleeping at
13 night. Tr. 257, 264.

14 In evaluating plaintiff's residual functional capacity, the
15 ALJ found that plaintiff's allegations concerning disability were
16 not entirely credible. Tr. 17-18. The defendant concedes that
17 plaintiff has severe impairments, which can reasonably cause the
18 symptoms plaintiff complains about. The parties agree that
19 plaintiff has satisfied the first requirement of the test set
20 forth in Cotton v. Bowen, 799 F.2d 1403 (9th Cir. 1986). The
21 issue is whether plaintiff's subjective statements concerning the
22 severity of her symptoms and functional abilities are credible.
23 The Commissioner does not concede that there were errors in the
24 ALJ's evaluation of plaintiff's credibility regarding her
25 subjective statements. Defendant's Memo in Support of Remand, p.
26 2.

27 In order to reject plaintiff's subjective claims once
28 plaintiff establishes the existence of an impairment and a casual

1 relationship between the impairment and some level of symptoms,
2 the ALJ must provide clear and convincing reasons, supported by
3 substantial evidence. Morgan v. Comm'r of Soc. Sec. Admin., 169
4 F.3d 595, 599 (9th Cir. 1999). The ALJ may consider, for example:
5 (1) ordinary techniques of credibility evaluation, such as the
6 plaintiff's reputation for lying, prior inconsistent statements
7 concerning the symptoms, and other testimony by plaintiff that
8 appears less than candid; (2) unexplained or inadequately
9 explained failure to seek treatment or to follow a prescribed
10 course of treatment; (3) plaintiff's daily activities; and (4)
11 medical evidence tending to discount the severity of subjective
12 claims. Rollins v Massanari, 261 F.3d 853, 856-57 (9th Cir.
13 2001).

14 The ALJ must identify what testimony is not credible and
15 what evidence undermines plaintiff's complaints. Lester v
16 Chater, 81 F.3d 821, 835 (9th Cir. 1995). The ALJ's reasons here
17 fail to meet this legal standard. The ALJ stated that
18 examinations by medical consultants had revealed "gross symptom
19 exaggeration." Tr. 18. Dr. French did note equivocal effort and
20 inconsistencies, however, he did not question plaintiff's
21 integrity or truthfulness. Tr. 229. In fact, Dr. French noted
22 that his examination was "certainly" consistent with the
23 radiographic evidence of degenerative changes in plaintiff's
24 knee. Tr. 230. He also described plaintiff as "emotionally
25 labile" and noted that she appeared to have "significant
26 depression," perhaps more limiting than her musculoskeletal
27 problems. Id. Further, regarding Dr. Kruger's testing, while he
28 stated that plaintiff tended to exaggerate her symptoms on the

1 MMPI-2, he did not suggest that she was in any way malingering.
2 Moreover and significantly, he appears to have adopted in full
3 the MMPI findings in making his diagnoses. Tr. 222-23. After a
4 thorough reading of the record including the ALJ's reasons for
5 rejecting plaintiff's testimony, I find those reasons fail to
6 rise to the level of clear and convincing evidence. Plaintiff's
7 testimony is therefore credited. Moisa v. Barnhart, 367 F.3d
8 882, 887 (9th Cir. 2004). Finally, I note that a finding as to
9 plaintiff's credibility is not in itself sufficient to establish
10 plaintiff's disability (or lack thereof). All of the evidence in
11 the record, including plaintiff's statements, must be considered
12 prior to reaching a conclusion about disability. See Social
13 Security Ruling 96-7p.

14 CONCLUSION

15 The Commissioner's decision is not based on substantial
16 evidence, and is therefore, reversed and remanded for payment of
17 benefits. Further, defendant's motion to remand (doc. 17) is
18 denied. This case is dismissed.

19 IT IS SO ORDERED.

20 Dated this 28 day of May 2008.

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25 Ann Aiken
26 United States District Judge
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